

APR 23 1951

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. 352

THE TIMKEN ROLLER BEARING COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.**

**MOTION OF APPELLANT FOR INCORPORATION OF
ADDITIONAL PROCEEDINGS IN THE DISTRICT
COURT IN THE RECORD ON APPEAL.**

LUTHER DAY,
Union Commerce Bldg.,
Cleveland 14, Ohio,
JOHN G. KETTERER,
First National Bank Bldg.,
Canton 2, Ohio,
Counsel for Appellant.

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MOTION OF APPELLANT FOR INCORPORATION OF ADDITIONAL PROCEEDINGS IN THE DISTRICT COURT IN THE RECORD ON APPEAL.

Now comes the appellant and says that on January 24, 1951, it filed a motion in the District Court of the United States for the Northern District of Ohio, Eastern Division, which entered the final judgment in this case from which this appeal is taken, asking that court to ask leave of this Court to consider this appellant's motion, made contemporaneously therewith, that the District Court receive additional evidence and reconsider its final judgment in this case because of changed circumstances due to the death of Michael B. U. Dewar since the perfection of this appeal, and that on April 10, 1951 said motion was overruled by order of the District Court.

True and full copies of said motion and the order of the District Court overruling the same, duly certified to be such by the Clerk of the District Court, are attached hereto.

The appellant respectfully moves that said motion of the District Court in this case and the District Court's order with respect thereto, be made a part of the record in this case on appeal in this Court.

LUTHER DAY,

JOHN G. KETTERER,

Counsel for Appellant.

Civil Action No. 24,214.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE TIMKEN ROLLER BEARING COMPANY,

Defendant.

MOTION BY THE TIMKEN ROLLER BEARING COMPANY, DEFENDANT IN THIS COURT, APPELLANT IN THE SUPREME COURT OF THE UNITED STATES, THAT THIS COURT ASK LEAVE OF THE SUPREME COURT OF THE UNITED STATES TO CONSIDER DEFENDANT'S MOTION THAT THIS COURT RECEIVE ADDITIONAL EVIDENCE AND RECONSIDER ITS FINAL JUDGMENT HEREIN AND, IF LEAVE BE GRANTED, THAT THIS COURT PROCEED SO TO DO, BECAUSE OF CHANGED CIRCUMSTANCES DUE TO THE DEATH OF MICHAEL B. U. DEWAR SINCE THE PERFECTION OF AN APPEAL HEREIN TO THE SUPREME COURT OF THE UNITED STATES.

NOW PENDING ON APPEAL IN THE SUPREME COURT OF THE UNITED STATES.

The Timken Roller Bearing Company, defendant in this Court, appellant in the Supreme Court of the United States (hereinafter styled "the defendant"); in support of its motion that this Court ask leave of the Supreme Court of the United States to consider defendant's motion that this Court receive additional evidence and reconsider its final judgment herein and, if leave be granted, that this Court proceed so to do, because of changed circumstances due to the death of Michael B. U. Dewar since the perfection of an appeal herein to the Supreme Court of the United States, respectfully shows to the Court as follows:

1. Michael B. U. Dewar died in England on December 21, 1950 at the age of 64. He and his acts and agreements with the defendant and others figure prominently and are mentioned frequently in the record, and in the memorandum opinion of this Court in this cause, which was tried throughout and decided upon the basis that Dewar was alive.

2. The final judgment in this cause was appealed to the Supreme Court of the United States on the 28th day of July, 1950, and is now pending on appeal in that Court, being cause No. 352 therein. The appeal was perfected before Dewar died.

3. At the time Dewar died, to wit, on December 21, 1950, he owned approximately 23.74 per cent, consisting of 94,960 ordinary shares, of the issued and outstanding stock of British Timken, Ltd. (hereinafter called "British Timken"), a British corporation engaged in the manufacture of anti-friction bearings, all of the stock of which was acquired jointly by Dewar and the defendant in 1927. At the time of Dewar's death, and at the present time, the defendant owned, and owns, approximately 30.26 per cent, consisting of 121,040 ordinary shares, of the stock thereof. The above described ordinary shares owned by the defendant and by Dewar's estate constitute approximately 54 per cent of the ordinary shares of stock of British Timken, the vote of which is entitled to control its affairs in the absence of default by it with respect to its preferred stock requirements. At the time Dewar died, and at the present time, there was, and is, in full force and effect an agreement between him and the defendant made March 22, 1948 (the latest of a series of agreements which carried out the fundamental agreement to the same effect made in 1927), by virtue of which the defendant now has the option to purchase all or any of the 94,960 ordinary shares in British Timken belonging to Dewar, exercisable at any time during a period of six months from and after Dewar's death by notice in writing served upon the holders of such 94,960 ordinary shares within the period of six months during which the option is

exercisable, at a price agreed upon by the parties, or, failing agreement, at the average price of similar shares of British Timken on the London Stock Exchange over a period of thirty days immediately preceding the date on which the option became exercisable, namely, Dewar's death on December 21, 1950.

4. At the time Dewar died on December 21, 1950, and at the present time, the defendant owned, and now owns 50 per cent, consisting of 40,000, and La Reunion Industrielle Societe Anonyme (hereinafter called the Lux Company, a company incorporated in Luxembourg, all of the shares of which have been owned directly or indirectly by Dewar) owned, and now owns the other 50 per cent, consisting of 40,000, of the issued and outstanding ordinary 100 franc par shares of the stock of Societe Anonyme Francaise Timken (hereinafter called "French Timken"), a French corporation engaged in the manufacture and sale of anti-friction bearings in France, which was organized at the joint instance of the defendant and Dewar in 1928 and has been jointly owned by them, or corporations owned by them, at all times thereafter. The votes of the above described ordinary shares of French Timken are entitled to control its affairs. The defendant and the Lux Company each own, also, 50 per cent of the issued and outstanding preferred stock and promissory notes of French Timken. By the terms of Section 5 (h) of an agreement entered into on or about the 11th day of December, 1935, by and between the defendant, the Lux Company, Frederick John Pascoe (as trustee) and Dewar, it is provided that, upon the death of Dewar, the Lux Company, if so requested by the defendant, will cause one share or other holding of shares in French Timken carrying one vote, to be transferred to the defendant or its nominees at the par value of such share or holding, thus transferring voting control of French Timken to the defendant, and it is further provided, in section 6, that no share of French Timken owned or controlled by the defendant or the Lux Company at the date of

said agreement will be sold, transferred or otherwise disposed of unless it has been first offered for sale to the other party by notice in writing, the offer to remain open for acceptance by the party to whom it is made for ninety days after it is received by such party.

5. The defendant acquired 52½ per cent and Dewar 47½ percent of the capital stock of British Timken in 1927, and the defendant and Dewar caused French Timken to be organized and each acquired, directly or indirectly, half of its ordinary shares, as above set forth, pursuant to a general arrangement in the nature of a joint venture between them by which, in substance, Dewar was to have control of the ordinary affairs of British Timken and French Timken during his lifetime and active participation in the management thereof while those companies made specified profits, and the defendant had the right to acquire complete control of each company in certain events, including Dewar's death, as aforesaid. This arrangement has continued from its inception in 1927 until the date hereof.

6. The defendant intends and proposes, as soon as may be practicable, to exercise its rights under the six months option granted to it by the terms of the aforesaid agreement relating to British Timken stock, and under the option to acquire voting control of French Timken granted to it by the terms of the aforesaid agreement relating to French Timken stock, and proposes to consider the purchase of the remainder of the stock of French Timken, if the same should be offered to it by the Lux Company for ninety days pursuant to the latter agreement. The defendant considers that it is free so to do without violating any of the provisions of this Court's final judgment in this cause, by virtue of its order entered July 28, 1950 allowing an appeal to the Supreme Court of the United States and staying the execution of said judgment pending the final disposition of said appeal, which order provides as to such stay that:

... * * * the execution against the above named defendant of all of the provisions of the Final Judgment entered

herein, and compliance by the defendant with said Final Judgment be and the same are, hereby suspended and stayed pending the hearing and final determination of this cause upon appeal."

7. Inasmuch as the time within which the defendant may give the required notices of its intention to exercise its respective options above described is limited as above set forth, it is imperative that it proceed with dispatch so to do for the reason that, if said options are not exercised by it within the times limited, and the final judgment of this Court is reversed or modified by the Supreme Court of the United States, and it is ultimately determined that the defendant may lawfully exercise said options and acquire the stocks covered thereby, it may sustain great and irreparable loss, in that the stock of either or both of British and French Timken, respectively, including the element of control incident thereto, may be sold to purchasers other than the defendant.

8. If the defendant exercises its option, hereinbefore described in paragraph 3, to acquire Dewar's ordinary shares in British Timken, it will be the owner of 216,000 ordinary shares of the stock of British Timken out of a total of 400,000 shares, and will be a majority and controlling shareholder of said corporation with the ensuing and attendant rights to exercise all of the powers vested in it as such.

9. If the defendant exercises its option, hereinbefore described in paragraph 4, to acquire the controlling share or shares in French Timken from the Lux Company it will be the majority and controlling shareholder of French Timken with the ensuing and attendant rights to exercise all of the powers vested in it as such, and if the Lux Company decides to sell its shares of French Timken, the defendant will have the right to become the owner of all of the stock of French Timken.

10. If the respective options above described are exercised by the defendant and as a consequence thereof, stock

interests in British Timken and French Timken, respectively, are acquired as above set forth, it will follow that the defendant will be a majority stockholder of both British and French Timken, respectively, and possibly the sole owner of French Timken, instead of a minority stockholder in British Timken and an equal stockholder with Dewar in French Timken, as it was before Dewar died.

11. The exercise by the defendant of the options to acquire Dewar's former stock interest in British Timken and French Timken, respectively, and the resulting changed and additional stock interest of the defendant therein will necessarily raise and present for determination legal questions which have not heretofore been considered nor decided by this Court, in the light of the changed circumstances, including particularly the question of whether the defendant should be permitted to conduct its operations in the British Empire and Europe through British Timken and French Timken, as majority owned subsidiaries, or, instead, be required to divest itself of all interest in those companies, as presently decreed by this Court.

12. It is in the furtherance of justice, in view of the fact that Dewar has died since the perfecting of the appeal to the Supreme Court of the United States in this cause, and the further fact that the defendant intends and proposes to exercise the options granted to it to acquire additional stock interests in British Timken and French Timken, respectively, as above set forth, that the record in this case be reopened by this Court for the purpose of permitting the defendant to introduce evidence of these facts and the new situation thereby created.

13. The taking of additional evidence in the respects above stated, will result in having the record in this cause disclose the facts as they now actually exist, and will thereby prevent unnecessary delay and prolixity in the final disposition of this cause both in this Court and on appeal in the Supreme Court of the United States.

14. It is no longer equitable, because of the occurrence of the death of Dewar and the perfection of the resulting rights in the defendant, all of which has occurred since the rendition of this Court's final judgment herein, that such final judgment should have prospective operation in certain respects, including particularly Section IV thereof which terminates, and restrains the defendant from further enforcing any of the provisions of the agreement dated March 22, 1948, between the defendant and Dewar which grants to the defendant the option to purchase Dewar's ordinary shares of stock in British Timken referred to in paragraph 3 hereof, and Section VIII thereof which requires the defendant to divest itself of all stock holdings and other financial interest, direct or indirect, in British Timken and French Timken, and enjoins it from acquiring any ownership interest in British Timken or French Timken by purchase or acquisition of assets or securities or through the exercise of any option, and from exercising any authority or control over the sale or other business policies of British Timken or French Timken.

15. This Court has jurisdiction to ask leave of the Supreme Court of the United States to consider the defendant's motion that this Court receive additional evidence in the respects above set forth, determine the legal questions presented by reason of the change of circumstances as to stock ownership and control of the defendant in British Timken and French Timken, respectively, and reconsider its final judgment herein, and, if leave be granted, to proceed so to do, by virtue of the decisions and holdings of the Supreme Court of the United States in *Roemer v. Simon*, 91 U. S. 149 and *Realty Acceptance Corporation v. Montgomery*, 284 U. S. 547, 551.

WHEREFORE, The Timken Roller Bearing Company, defendant in this Court, appellant in the Supreme Court of the United States, respectfully moves this Court as follows:

1. That this Court make application to the Supreme Court of the United States for leave to consider the motion

made by the defendant in the next succeeding paragraph hereof, and in connection therewith

(a) to receive evidence and insert it in the record in this cause;

(b) to consider such additional evidence and make its findings of fact and conclusions of law with respect thereto;

(c) to obtain, upon further application to the Supreme Court of the United States by this Court, a remittitur of all or so much of the record in this cause now filed in the Supreme Court of the United States as this Court may deem necessary to further consideration of this cause in the light of such additional evidence;

(d) to reconsider its final judgment herein and to relieve the defendant therefrom by vacation or modification thereof, if this Court shall deem such action just; and

(e) in the event that this Court shall not vacate its final judgment herein, to certify such proceedings had pursuant to this motion to the Supreme Court of the United States for inclusion as part of the record on appeal in that Court in this cause.

2. That this Court, upon receiving leave from the Supreme Court of the United States, proceed further in this cause:

(a) to receive and insert in the record in this cause evidence that Michael B. U. Dewar died at the age of 64 on December 21, 1950, after the appeal from this Court to the Supreme Court of the United States had been perfected;

(b) to receive and insert in the record in this cause evidence that the defendant proposes to exercise, as soon as may be practicable, its rights under the option agreements hereinbefore described and thereby to acquire 94,960 ordinary shares of the stock of British Timken, and shares carrying one vote in French Tim-

ken, or part or all of the shares of French Timken now owned by the Lux Company if the same shall be offered to the appellant;

(c) to receive and insert in the record in this cause any other evidence offered by the parties which the Court shall deem competent, relevant and material;

(d) to consider such new and additional evidence described in subparagraphs (a) through (c) of this paragraph 2, and determine the legal questions presented by the change of circumstances resulting from the death of Dewar and the exercise by the defendant of the options hereinbefore described, and make its findings of fact and conclusions of law with respect thereto;

(e) to reconsider its final judgment herein and to relieve the defendant therefrom by the vacation thereof, or, in the event that the Court shall not vacate the same, by modification thereof to eliminate the provisions of Sections IV and VIII thereof which adversely affect the rights of the defendant as specified in paragraph 14 hereof, or otherwise as may to the Court seem appropriate; and

(f) in the event that this Court shall not vacate its final judgment herein, to certify such proceedings had pursuant to this motion to the Supreme Court of the United States for inclusion as part of the record on appeal in that Court in this cause.

/s/ LUTHER DAY,
LUTHER DAY,

1759 Union Commerce Building,
Cleveland, Ohio,

/s/ JOHN G. KETTERER,
JOHN G. KETTERER,

First National Bank Building,
Canton, Ohio,

*Attorneys for Defendant-Appellant,
The Timken Roller Bearing Company,*

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO, SS.:

I, C. B. WATKINS, Clerk of the United States District Court in and for the Northern District of Ohio, do hereby certify that the annexed and foregoing is a true and full copy of the original Motion by The Timken Roller Bearing Company, Defendant in this Court, Appellant in the Supreme Court of the United States, that this Court ask leave of the Supreme Court of the United States to consider Defendant's motion that this Court receive additional evidence and reconsider its Final Judgment herein and, if leave be granted, that this Court proceed so to do, because of changed circumstances due to the death of Michael B. U. Dewar since the perfection of an appeal herein to the Supreme Court of the United States now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Cleveland, Ohio this 17th day of April, A. D. 1951.

C. B. WATKINS,
Clerk.

By JAMES P. RAINEY,
Deputy Clerk.

(Seal)

Civil Action No. 24,214.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE TIMKEN ROLLER BEARING COMPANY,

Defendant.

ORDER ON MOTION BY THE TIMKEN ROLLER BEARING COMPANY, DEFENDANT IN THIS COURT, APPELLANT IN THE SUPREME COURT OF THE UNITED STATES, THAT THIS COURT ASK LEAVE OF THE SUPREME COURT OF THE UNITED STATES TO CONSIDER DEFENDANT'S MOTION THAT THIS COURT RECEIVE ADDITIONAL EVIDENCE AND RECONSIDER ITS FINAL JUDGMENT HEREIN AND, IF LEAVE BE GRANTED, THAT THIS COURT PROCEED SO TO DO, BECAUSE OF CHANGED CIRCUMSTANCES DUE TO THE DEATH OF MICHAEL B. U. DEWAR SINCE THE PERFECTION OF AN APPEAL HEREIN TO THE SUPREME COURT OF THE UNITED STATES.

(Filed April 10, 1951.)

The instant motion was submitted to the Court on oral arguments and extensive briefs of the respective parties.

It is urged that the change of circumstances which developed since the cause was heard should prompt this Court to request the Supreme Court for permission to hear new evidence, make additional findings of fact and state its conclusions of law and determine the effect of the changed factual situation on the decision heretofore rendered.

Defendant points out that Michael B. U. Dewar died in December, 1950. During his lifetime (and at the time of trial), he owned 23.74 per cent of the stock of British

Timken, Limited. Defendant had at the time of trial and now has the option to purchase this stock as well as stock in French Timken, all of which would give defendant a controlling interest in British Timken and possibly the outright ownership of French Timken. Defendant recently indicated to the proper parties its desire to exercise the option.

After due consideration, the Court is of the opinion, in the light of the facts and on the evidence developed at the time of trial, that the reasons advanced in support of the motion warrant neither the re-examination of the final judgment in respect of the finding of violation of the Sherman Anti-trust Act nor the reconsideration of the relief which this Court regards as essential and necessary to remove the existing impediments to competition.

IT IS THEREFORE ORDERED that the motion be and is hereby overruled.

FREED,

United States District Judge.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO, SS.:

I, C. B. WATKINS, Clerk of the United States District Court in and for the Northern District of Ohio, do hereby certify that the annexed and foregoing is a true and full copy of the original Order on Motion by The Timken Roller Bearing Company, Defendant in this Court, Appellant in the Supreme Court of the United States, that this Court ask leave of the Supreme Court of the United States to consider Defendant's motion that this Court receive additional evidence and reconsider its Final Judgment herein and, if leave be granted, that this Court proceed so to do, because of changed circumstances due to the death of Michael B. U. Dewar since the perfection of an appeal herein to the Supreme Court of the United States now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Cleveland, Ohio this 17th day of April, A. D. 1951.

C. B. WATKINS,
Clerk.

By JAMES P. RAINEY,
Deputy Clerk.

(Seal)